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Supreme Court of the United States

OCTOBER TERM, 1970

70-54

No. ~~1092~~

VICTORY CARRIERS, INC., S. S. SAGAMORE HILL, AND GULF STEVEDORE CORP.,

Petitioners,

versus

BILL LAW,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT

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No. 1092

VICTORY CARRIERS, INC., S. S. SAGAMORE HILL, AND GULF STEVEDORE CORP.,

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versus

BILL LAW,

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BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

The Respondent Bill Law was a member of a longshore gang and employed by an independent stevedore under contract to load the SS SAGAMORE HILL. His job was to move cargo with a fork lift machine from a pile on the dock near the ship to the "hook-up" point where it was lifted aboard the ship. He was injured when the "headache" rack of the lift machine fell on him.

QUESTION FOR REVIEW

Where a longshoreman is directly and intimately involved in the loading of a vessel on navigable waters and is using equipment which is a necessary and essential tool in the loading process does the warranty of seaworthiness protect such a longshoreman when he is injured by a defect in the equipment he is using.

STATEMENT OF THE CASE

As the Petitioner has stated in his brief at page 10, the facts in this case are not in serious dispute. And for that reason Respondent would not feel constrained to restate the case. However, we feel that it is necessary to bring to the Court's attention certain aspects of Petitioners relation of those facts which he has characterized in a way which may be misleading, although Respondent has no doubt such was not his intent.

First; at page four he has said "The landing mats were not loaded directly onto the vessel from the fork lift machine being operated by the Respondent; he would set them down on the dock, and the mats would subsequently be loaded onto the vessel by other longshoremen by use of the vessel's gear and equipment (A. 90-91)."

Respondent insists that Petitioner had injected a legal conclusion into what should be an objective statement of fact; to-wit, by saying that the mats were "subsequently loaded onto the vessel by other longshoremen" he infers that Respondent was not "load-

ing" the cargo. We submit that the term "loading" is a word which has received a legal definition and that whether or not Respondent was engaged in the "loading" process should be left to the determination of this Court. Further, the Petitioner's statement should not be taken to mean the Respondent was moving cargo from one place of storage on the dock to another place of storage. The Respondent's testimony shows that he was moving the cargo from its place of storage directly to the hook-up point where it was attached to the winch cables and taken aboard as part of a continuous process (A. 61, 90, 92.).

Second; at the same page (4) Petitioner has stated that "None of the vessel's gear, equipment, or appurtenances were in any way involved with the loosening of the rack and the resulting accident (A. 90)." As Petitioner himself has pointed out, this is one of the questions this Court must determine, i.e., whether this lift machine was an "appurtenance" of the ship. Therefore this statement commits the same transgression upon this Court's prerogative as the first mentioned.

SUMMARY OF ARGUMENT

The admiralty jurisdiction of the United States Courts may be envoked either under the General Maritime Law, (*Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303 (9 Cir. 1970), *Gutierrez v. Waterman Steamship Corp*, 373 U.S. 206, 83 S. Ct. 1185 (1963)) or under the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. 740.

Under the General Maritime Law jurisdiction in unseaworthiness cases is established when a longshoreman pleads all the elements of his cause of action. That is; (1) that he was in the service of a vessel on navigable waters (2) that he was injured by an appurtenant appliance of the vessel, and (3) that the appliance was not reasonably fit for its intended use. Such a cause of action necessarily possesses the necessary maritime status or maritime relation to establish jurisdiction. *Gebhard v. S.S. Hawaiian Legislator,* 425 F.2d 1303 (9 Cir. 1970); *Gutierrez v. Waterman Steamship Corp.,* 373 U.S. 206, 83 S. Ct. 1185 (1963); *Strika v. Netherlands Ministry of Traffic,* 185 F.2d 555 (2 Cir. 1950).

Jurisdiction in Admiralty unseaworthiness actions may also be based on the Extension of Admiralty Jurisdiction Act, 46 U.S.C. 740. Jurisdiction under the Act is dependent on an injury being "caused by" a vessel on navigable waters. Where equipment is directly used in the loading process of such vessel and is an intimate and integral tool in the loading operation it becomes an appurtenant appliance in the service of the vessel and if, by reason of a defect in that equipment injury results, such an injury, is "caused by" the vessel within the meaning of the Extension Act.

The only meaningful test to determine whether the warranty of seaworthiness protects the Respondent Bill Law is to ask if he was in the service of the vessel and if he was injured by an appurtenance of the vessel. Whether the Respondent was in the service of the vessel depends upon whether he was engaged in loading the vessel. Properly, the same questions must be asked

in deciding whether the equipment, being used by one in the service of a vessel, must conform to the standard required by the warranty of seaworthiness. That is to say if injury results from equipment which is in the service of the vessel, then that equipment should conform to the standards of the warranty. It is irrelevant that the equipment is not a physical agency of the vessel and is likewise irrelevant that the equipment does not come in physical contact with the vessel when the injury occurs. Neither is it material, in terms of the unseaworthiness doctrine, that the shipowner does not have the power to inspect or control the injury producing agency.

Bill Law was using a fork lift machine to move cargo from its place of storage fifty feet from the ship to the hook-up point at ship-side. From there the cargo was taken directly aboard. While so engaged the protective rack on the machine fell on him and he was injured. The Fifth Circuit Court of Appeals was correct in holding, (1) that the work lift machine was an appurtenance of the vessel, and (2) that Bill Law was an integral part of the loading process and therefore within the warranty of seaworthiness.

I

ARGUMENT

Where A Longshoreman Is Engaged In Loading A Ship On Navigable Waters And Is Injured By Equipment Used To Load The Ship, He, And The Equipment, Are In The Service Of The Ship And He May Envoke The Admiralty Jurisdiction Of The Federal Courts Under The General Maritime Law Or Under The Extension Of Admiralty Jurisdiction Act.

The Petitioner has stated his argument so that it appears there are two distinct and independent issues before the Court for consideration. He has begun by denying that Respondent is entitled to envoke the Admiralty Jurisdiction of the District Court and in Part II of his brief he attempts to dissect the substantive aspects of the Respondent's cause of action to the conclusion that no cause of action exists.

Respondent protests this attempt to divide what has become the indivisible. Our position is simply stated: If a plaintiff pleads all the elements of his unseaworthy cause of action then, a fortiori, there is admiralty and maritime jurisdiction under the general maritime law. *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303 (9 Cir. 1970). We would have thought that, at least since *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 83 S. Ct. 1185, 10 LEd2d 297 (1963), this was so well founded and fundamental as to require no elaboration. To consider the point otherwise simply begs the question.

To be sure, under the early rules of admiralty tort jurisdiction the "situs" or "locality" test of jurisdiction was a question which could be raised separately and independently from the substantive aspects of an unseaworthiness claim. There, so long as the injury was consummated on "land" or on a dock (an extension of the land) there was no jurisdiction and the inquiry ended at that point. The Plymouth, 3 Wall. 36, 18 LEd 128. The Courts of Admiralty were without the power to take cognizance of the case. But cf. *Atlantic Transport Company of West Virginia v. Imbrovek*, 234 U.S. 52, 58 LEd 1208 (1914).

Respondent strongly urges that in unseaworthiness cases *Gutierrez* and the cases following have made the "situs" or "locality" test of admiralty jurisdiction of historical interest only. In its place the general maritime law has developed a realistic ". . . . tort of unseaworthiness (which) arises out of a maritime status or relation and is therefore 'cognizable by the maritime (substantive) law whether it arises on sea or on land' ". The word (which) supplied by the writer. *Gutierrez*, supra; *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303 (9 Cir. 1970), *Strika v. Netherlands Ministry of Traffic*, 185 F.2d 555 (2 Cir. 1950), cert. denied 341 U.S. 904 (1951) and see *O'Donnell v. Great Lakes Dredge and Dock Company*, 318 U.S. 36, 63 S. Ct. 488 (1943), *Swanson v. Marra Bros.*, 328 U.S. 1, 66 S. Ct. 869 (1946), *Pope & Talbot v. Hawn*, 346 U.S. 406 74 S.Ct. 202 (1953), *Hagans v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3 Cir. 1963), *Chagois v. Lykes Bros. Steamship Co.*, 432 F.2d 388 (1970).

With the situs test thus eliminated in unseaworthiness cases:

> "Admiralty jurisdiction exists whenever the petitioner has successfully pleaded all the elements of the tort: (1) that his work was 'in the ships service' and that the warranty of seaworthiness thereby extended to him (Gutierrez v. Waterman S.S. Company (1963) 373 U.S. 206, 214-215, 83 S. Ct. 1185, 10 LEd 2d 297), (2) that he was injured by a piece of equipment not reasonably fit for its intended use (Mitchell v. Trawler Racer, Inc., (1960) 362 U.S. 539, 550, 80 S. Ct. 926, 4 LEd 2d 941) and (3) that the piece of equipment was a part of the ships equipment or an appurtenant appliance. (Huff v. Matson Navigation Co. (9 Cir. 1964), 338 F.2d 205, cert. denied (1965) 380 U.S. 943, 85 S.Ct. 1026, 13 LEd 2d 963). Such an unseaworthiness claim would necessarily possess the requisite maritime status or 'relation', and admiralty jurisdiction would exist regardless of the locality of the injury". *Gebhard v. S.S. Hawaiian Legislator,* supra.

It has been made clear in Gutierrez that the Extension of Admiralty Jurisdiction Act, 46 U.S.C. 740, 62 Stat. 496 and the "status" or "relation" basis of jurisdiction are distinct principles, either of which will support jurisdiction. There, this Court specifically agreed with Judge Learned Hand's reasoning in *Strika v. Netherlands Ministry of Traffic,* 185 F.2d 555 (2 Cir. 1950).

> "Public Law 695 of June 19, 1948 has now probably laid all such doubts, but we think that it was not necessary in order to support a recovery in this particular situation. *Strika,* supra. ... From this the defendant argues that since an action upon such as implied warranty is only a tort, the maritime law can have no jurisdiction over a breech of it occurring upon land; that being, of course, an accepted constitutional limitation upon maritime law. We should have found this as serious obstacle, were it not for *O'Donnell v. Great Lakes Dredge & Dock Co.,* supra, and the *ratio dicidendi* of *Swanson v. Marra Brothers, Inc.,* supra; but those decisions appear to us to settle it that such a tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land."

Respondent can imagine no better way to emphasize its point than to remind the Court that Petitioner has mentioned the Extension Act for the first time only in his Petition for Rehearing before the Fifth Circuit Court of Appeals. Further, the respected trial judge, in granting Petitioner's (Defendant's) Motion for Summary Judgment made no mention of the Act in his opinion granting the motion. Further still, none of the cases upon which Petitioner relies in his brief, with the exception of one faint dissent in *Gebhard,* have ever questioned that "jurisdiction" was present and none have seen fit to discuss the Extension of Admiralty Jurisdiction Act. And yet Petitioner complains that

the Fifth Circuit did not consider the Act in upholding the right of Bill Law to the Unseaworthiness remedy.

It is submitted that even in those cases where recovery was denied and upon which Petitioner places reliance, the Courts accepted the principle that jurisdiction was present under the general maritime law but denied recovery under the facts. Thus, in the companion cases of *Drumgold v. Plovda*, 260 F. Supp. 983 (E.D. Va. 1966) and *Hyter v. D. B. Denig Naklihati T.A.S.*, 260 F. Supp. 983 (E.D. Va. 1966) we find the Judge denying recovery because, "We do not, however, find that the loading operation in *Drumgold* had commenced — and we further find that the loading operation in *Hyter* had terminated" Clearly the Court recognized that "jurisdiction" and the cause of action were one and the same and that neither were dependent on Section 740 — the Extension Act. Again, in *Forkin v. Furness Withy & Co.*, 323 F.2d 638 (1963) and *McKnight v. N. M. Patterson & Sons*, 181 F. Supp. 434 (N.D. Ohio 1960) aff'd, 286 F.2d 250 (6 Cir. 1960) cert. denied, 368 U.S. 913, it was held that the plaintiff (McKnight) was "doing ship's service work as an employee of an independent contractor and was entitled to the same protection against unseaworthiness which members of the crew would enjoy ... (however) ... none of the traditional unloading gear of the ship, namely winches, masts or booms were being used in the operation in which he was engaged." In *Forkin* the gear used was held not to be appurtenant to the ship. While we disagree with these holdings, as discussed at length, infra, it cannot be gainsaid that both Courts assumed the existence of Jurisdiction since it

is inextricably bound to the cause of action and that in neither case was it felt that an examination of the Extension Act was necessary.

Respondent feels that whether jurisdiction is premised on the general maritime law or upon the Extension of Admiralty Jurisdiction Act the same result will obtain in this case, because Respondent's injury was caused by an appurtenance of the vessel (Discussed at length, infra), thus being an injury "caused by a vessel" under the Extension Act. Petitioner's argument to the contrary is based solely on the premise that since the forklift machine that respondent was operating did not go aboard the vessel or have actual physical contact with the vessel, the accident cannot be said to have been "caused by" the vessel. In construing the Extension Act, this Court has rejected the notion that the act should be so interpreted and has clearly laid to rest such mechanistic logic. In *Gutierrez* the Court stated:

> "Respondent and the carrier amici curiae would have the statute limited to injuries actually caused by the physical agency of the vessel or a particular part of it — as when the ship rams a bridge or *when its defective winch drops some cargo onto a longshoreman.* Cf. *Strika v. Netherlands Ministry of Traffic,* 185 F.2d 555 (CA 2d Cir.); *Hagans v. Farrell Lines, Inc.,* 237 F.2d 477 (CA 3d Cir.). Nothing in the legislative history supports so restrictive an interpretation of the statutory language." Emphasis supplied;

Yet Petitioner would say that if the equipment is not a "physical agency" of the vessel it cannot be an appurtenance thereof. Of course it is well established that equipment need not belong to the ship to be "appurtenant" and may be so even though it belongs to the stevedore. *Alaska Steamship Company v. Petterson*, 347 U.S. 396, 74 S. Ct. 601 (1954), aff'ing 205 F.2d 478. *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S. Ct. 748 (1964). And we would hazard the speculation that this case would not be before this Court at this time if the fork lift machine had been located in the hold of the ship, (and they are there daily in every port) rather than on the dock, since, in that event, no one would have doubted that the fork lift machine was an "appliance" or "appurtenance" of the ship for purposes of the unseaworthiness doctrine or for purposes of jurisdiction.

In stating his argument on this point, Petitioner, has placed much emphasis on *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 90 S. Ct. 347, 25 L. Ed. 2d 371 (1969), and particularly the language of Mr. Justice White concerning the limitations of the Longshoremen's Compensation Act:

> "There is much to be said for the uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not affect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act." 396 U.S. at 223.

The Plaintiff in *Nacirema* was arguing that uniformity in compensation cases would be achieved by applying the Longshoremen's Act to dockside injuries. Mr. Justice White, in the quoted passage, obviously and rightly pointed out that to tie the Compensation Act to the Extension Act would not achieve consistency since the right to compensation would then depend on the injury being "caused by a vessel." This, of course, would create even more inconsistency in that a longshoreman who was injured on the dock by an appurtenance of the vessel would be compensated under the Federal Act; while his fellow longshoreman, also injured on the dock, but not by an appurtenance of the vessel, would have to look to the State Act. The injection of this element of causation is repugnant to the very nature of workmen's compensation, and would create a controversy in the law of workmen's compensation similar to that which existed in the pre-Calbeck[1] era with its uncertain Seas of the "twi-light zone" and "maritime but local" theories.

Thus the holding of this Court in *Nacirema* is simply that the Longshoremen's and Harbor Workers' Compensation Act does not extend coverage to injuries occurring on the dock and that the Compensation Act was not amended by the Extension of Admiralty Jurisdiction Act; that this conclusion is compelled by the language of the Compensation Act and the legislative history of the Acts.

"The single question of statutory construction

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[1]Calbeck v. Travellers Ins. Co., 370 U.S. 114, 82 S. Ct. 1196 (1962)

presented by these cases is whether injuries to longshoremen occurring on piers permanently affixed to shore are compensable under the Longshoremen's and Harbor Workers' Compensation Act of 1927 (Longshoremen's Act) 44 Stat. 1424 33 U.S.C. Sec. 901-950." 396 U.S. at 213.

"The clear implication is that in enacting its own compensation statute, Congress was trying to do what it had failed to do in earlier attempts: to extend a compensation remedy to workmen injured beyond the pier and hence beyond the jurisdiction of the States. This purpose was clearly expressed in the language limiting coverage to injuries occurring 'upon the navigable waters,' and permitting recovery only 'if recovery .... through workmen's compensation proceedings may not validly be provided by State law.' This conclusion is fully supported by the legislative history." 396 U.S. at 216-217 (Footnotes omitted.)

"While the Extension Act may leave the effect of permitting respondents to maintain an otherwise unavailable libel in admiralty, see Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 10 LEd 2d 297, 83 S. Ct. 1185 (1963), the Act has no bearing whatsoever on their right to a compensation remedy under the Longshoremen's Act." 396 U.S. at 222-223 (Footnotes omitted.)

Therefore, in *Nacirema* this Court clearly recognized

that the limitation placed by Congress on the scope of compensation coverage under the Longshoremen's and Harbor Workers' Compensation Act is much narrower than the Jurisdiction of the Court over an Admiralty cause of action for injuries caused by an unseaworthy condition of a vessel or its appurtenances. It is difficult to see how the language and holding in *Nacirema* can be so misunderstood as to be taken as limiting this Court's statements in *Gutierrez* concerning jurisdiction over suits for injuries caused by an unseaworthy appurtenance of a vessel.[2] Even though *Nacirema* specifically approves *Gutierrez,* Petitioner asks the Court to re-draw the jurisdictional line at the waters edge in his argument that Admiralty Jurisdiction extends only to injuries caused by a "physical agency of the vessel."

The cases since *Gutierrez* have consistently recognized that Admiralty Jurisdiction extends to injuries caused by an appurtenance of the vessel, and that the only rational test of whether a piece of equipment is an appurtenance of the vessel is not whether the machine is on the dock or on the ship, but in what type of work it was engaged. *Deffes v. Federal Barge Lines Inc.*, 361 F.2d 422 (5 Cir. 1962); *Huff v. Matson Navigation Co.*, 338 F.2d 205 (9 Cir. 1964); *Spann v. Lauritzen,* 344 F.2d 204 (3 Cir. 1965); *Gebhard v. S.S. Hawaiian Legislator,* 425 F.2d 1303 (9 Cir. 1970); *Olvera v. Michalos,* 307 F. Supp. 9 (S.D. Tex. 1968); *Chagois v. Lykes*

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[2]Although such a misinterpretation was recently made by the District Court of Maryland in *Green v. Pope & Talbott,* (D.C. Md. Adm., No. 4809, April 6, 1971) (Several cases consolidated for decision)

Bros. S.S. Company, 432 F.2d 388 (1970). Not whether the machine is in physical contact with the vessel but, as with the *Sieracki* seaman, whether the machine "is performing ... a ... function essential to maritime service. . ."[3], and thus ". . . in the service of the vessel . . ."[4]. If so, then clearly an accident caused thereby is "caused by a ship" within the meaning of the Extension Act.[5]

Respondent, Injured On The Pier Alongside A Vessel While Transporting Cargo To The Vessel Was Loading The Vessel And Thus Performing Work In The Service Of The Vessel And Was Entitled To The Warranty Of Seaworthiness.

A. *General Discussion:*

Counsel for Respondent will not belabor the Court with lengthy and needless historical comment on the development of the seaworthiness doctrine and will mention that background only for brief orientation.

The starting point for all controversies involving application of the doctrine as it pertains to shore-based

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[3]Seas Shipping Company v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946)

[4]*Alaska S.S. Co. v. Petterson*, 347 U.S. 396, 74 S.Ct. 601 (1954).

[5]See also *Adams v. Harris County Texas*, 316 F. Supp. 938 (S.D. Tex. 1970) where the Extension Act is discussed and cases are collected. The Court there stated, at page 941, "In any given case, whether or not a person's injuries are 'caused' by a ship on navigable waters within the meaning of Section 740 depends in turn on the proximity of that person's relationship with the vessel." Jurisdiction was upheld when a drawbridge operator, in anticipation of an approaching vessel, lowered a barrier on a bridge which the plaintiff struck.

workers is *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946), wherein this Court applied the maritime warranty of seaworthiness, originally recognized in *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903), in favor of shore-based workers engaged aboard a vessel in work customarily or traditionally performed by seamen. In *Sieracki*, the Court evinced a willingness to recognize substance over form, and those "incurring a seaman's hazards" were accorded a seaman's protection, *Sieracki*, supra, despite " ..." 'the fortuitous circumstances' of their employment by one other than the owner to do the ship's work," or "more modern divisions of labor." Id. at 98, 96. Eight years later this Court in *Alaska Steamship Co. v. Petterson*, 347 U.S. 396, 74 S. Ct. 601 (1954), aff'ing 205 F.2d 478 (9 Cir. 1953), further protected these workers by holding that the vessel owner's absolute duty to provide seaworthy gear, equipment and appliances is the same when applied to the gear, equipment and appliances of the stevedoring contractor, and therefore cannot be nullified by delegating the loading or unloading operation or by assigning a portion of the operation to such an independent contractor. *Petterson* has been followed without variance since its affirmance. See *Rogers v. United States*, 347 U.S. 984, 74 S. Ct. 849 (1954), reversing, per curiam, 205 F.2d 57 (3 Cir. 1953); *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S. Ct. 748 (1964); *Litwinowicz v. Weyerhauser S.S. Co.*, 179 F. Supp. 812 (E.D. Pa. 1959).

Finally, in *Gutierrez v. Waterman Steamship Company*, 373 U.S. 206, 83 S. Ct. 1185 (1963) the Court, agreeing with the "ineluctable logic" of the cases, held sea-

worthiness includes fitness for loading and unloading and that the duty to provide a seaworthy ship and gear applies to longshoremen unloading the ships whether they are standing aboard the ships or on the pier. The important factor is the *status* of the injured party or his *relationship* to the vessel which entitles him to the maritime tort protections, since the work of loading and discharging a vessel is historically the work of the ship.

As this Court indicated in *Sieracki*, the warranty is imposed by reasons of the hazards attendant to the working of vessels. The liability of the vessel or its owner cannot be nullified by parceling out a portion of the shipping operation to independent contractors who perform the seaman's work of loading and unloading. It follows that with advanced technology which makes the loading and unloading operations faster and more profitable, the vessel owner cannot be relieved of liability because the equipment involved is not that used by members of the Hansiatic League. In *Sieracki*, the Court stated: "(t)hat the owner seeks to have it (loading and unloading) done with the advantages of more modern division of labor does not minimize the worker's hazards and should not nullify his protection." Id. at 96. Although the fork lift machine which Respondent was operating at the time of the accident in this case was, like the instrumentalities associated with many of the cases cited in this brief, not devices which were found on the ships of the Hanse Towns of Medival Europe the statement from *Sieracki* of "more modern divisions of labor is equally applicable to 'more modern labor saying devises." Further,

simply because the loading operation can be performed faster and more profitable by placing some in the hold of the ship and some on the dock to expedite the process does not minimize the workers hazards nor can it nullify his protection. Clearly the operation of the fork lift machines on the dock is a necessary adjunct to the stevedoring operation.

B. *THE RESPONDENT WAS IN THE SERVICE OF THE SHIP*

It is submitted that the warranty of seaworthiness extends to Respondent if he was engaged "in the service of the ship" at the time of his accident.[6] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872 (1946) has settled it that "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew." *Sieracki*, at U.S. 96. Under the facts, this in turn, depends upon

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[6] *Chargois v. Lykes Bros. Steamship Company*, 432 F.2d 388 (5 Cir. 1970)
Deffes v. Federal Barge Lines, Inc., 361 F.2d. 422 (5 Cir. 1966)
Spann v. Lauritzen, 344 F.2d 204 (3 Cir 1965)
Hagans v. Ellerman & Bucknall, S.S. Co., 318 F.2d 563 (3 Cir. 1963)
Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9 Cir. 1970)
Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3 Cir. 1964)
Litwinowicz v. Weyerhaeuser S.S. Co., 179 F. Supp. 812 (E.D. Pa. 1959)
McDonald v. United States, 321 F.2d 437 (3 Cir. 1963)
Byrd v. American Export Isbrandsten Lines, Inc., 300 F. Supp. 1207 (E.D. Pa. 1969)
Olvera v. Michalos, 307 F. Supp. 9 (S.D. Tex. 1968)
For contrary holding see *Drumgold v. Plovda* (E.D. Va. 1966) 260 F. Supp. 983 (Companion case to *Hyter v. Deniz-Naklikati TAS.*) and *Danial v. Skibs A/S Hilda Knudsen*, 368 F.2d 178 (3 Cir 1966).

whether Bill Law was "loading" the ship. Respondent feels that the reasoning of the Circuit Court below is to be particularly applauded for its clarity and would only emphasize certain portions of the Fifth Circuit's opinion.

> "We choose to align ourselves with the cases which define 'loading' and 'unloading' in a realistic sense rather than as hypertechnical terms of art. It seems to us that plaintiff Law was clearly engaged in 'loading' the SAGAMORE HILL under any conventional interpretation of that term. He was part of a group of longshoremen who were engaged in the total operation were on board the vessel, while others were on the dock. The efforts of both the ship-side workers and the shore-side workers were necessary to load the ship. We think it would be incongruous and capricious to deny the protection of the warranty of seaworthiness to Plaintiff Law while granting it to his fellow longshoremen whose duties happened to involve activities on the vessel or the actual physical act of lifting the cargo onto the ship."

> "We do not have here an accident occurring in some urban enclave or pastoral pasture far removed from the pier. On the contrary, Law's activities had proximity to and continuity with the job at hand — the task of loading cargo aboard the SAGAMORE HILL. His specific job performance was so integrally woven into the entire loading operation that the two cannot

> be separated except by the erection of hyper-technical and unrealistic legal barriers. If the terms 'loading' and 'unloading' are to be terms associated with reality rather than mere conceptual microcosms without adjuncts beyond the ship's beam, we have no choice but to conclude the plaintiff Law was engaged in loading the SAGAMORE HILL. We therefore hold that on the facts of this case — a longshoreman, intimately involved in the process of loading a vessel, injured as he moved cargo from the back to the front of the dock — plaintiff was within the scope of the warranty of unseaworthiness."

The cargo of a vessel must be handled on the dock in order to go aboard the ship. It is a continuous process and one which does not merely begin when the cargo is lifted aboard the ship. The operation of the fork lift machine by Respondent was a material, direct and integral part of the loading process, just as much connected with the loading and discharging as a winch or crane. Petitioner, as did the District Judge below, has raised various far fetched hypotheticals. In the same vein are the hypotheticals posed by the Court which decided *Drumgold v. Plovda* and *Hyter v. D.B. Denig Naklihati*, 260 F. Supp. 983 (E.D. Va. 1966) where that Court rebelled at considering the seaworthiness warranty to protect an imaginary longshoreman who took the stevedore's truck to town to obtain rope for the loading operation and while miles from the dock was involved in an accident. Neither the District Court in the present case nor the District Court in *Drum-*

gold and *Plovda* considered the "remoteness" test suggested by this Court in Gutierrez, which, if they had, no doubt would have laid their fears to rest.

Here, Respondent was neither too far removed in time nor place. Does not the cargo haye to be brought to a vessel before it is taken aboard? Is it reasonable to believe that "loading" does not take place until the moment the cargo hooks touch the cargo? Should it make any difference or be of any consequençe if the cargo hooks had come to rest on Respondent' fork lift or on the cargo as it lay on the machine's "fork" or in physical contact and then the headache rack fell on him? It clearly should not. Nor should it be of any consequence that the accident and the resulting injury occurred at some point between the vessel and the cargo pile some fifty feet away.

While the Fifth Circuit Court of Appeals was writing its opinion in the instant case another panel of that Court independently reached the same conclusions based on similar facts. There a longshoreman was in a railroad car at the dock alongside ship operating a "screw auger". The auger fed bulk rice from the car into the hopper of a marine leg or grain elevator. Another device, in the elevator, then took over and fed the rice ultimately into the hold of the ship. Plaintiff was hurt by the defective auger he was operating and the Court awarded judgment against the ship on the basis of unseaworthiness. On appeal the Fifth Circuit affirmed, stating:

"Chagois was injured while he was holding

> down the auger; his work — as much as that of the longshoremen stationed on the ship — was an essential part of an unbroken sequence of moving the rice from the pier to the ship."

In *Spann v. Lauritzen,* 344 F.2d 204 (3 Cir. 1965) the plaintiff longshoreman was working in a gang discharging bulk nitrate of soda from the hold of a ship. To do this a shorebased crane would reach into the ships hold for a bucket load of nitrate, pick it up and dump the nitrate into a large shorebased hopper. Plaintiff operated the "floor" of the hopper which opened to fill trucks, as they drove underneath to receive the cargo. He was injured when a bucket load of nitrate was dropped into the hopper causing a premature downward movement of the handle used to manipulate the floor. It was contended that the plaintiff was engaged in loading the trucks and not in unloading the ship. The Third Circuit would not allow such an artificial distinction stating:

> "He is no less so (within the protection of the maritime jurisdiction) because modern ingenuity suggested the desirability of combining the unloading of the vessel with the loading of the trucks. It has frequently been said that the doctrine of unseaworthiness is not to be rigidly construed so as to exclude from its scope modern machinery to do the work traditionally done in loading or unloading vessels. *Huff v. Matson Navigation Company,* 338 F.2d 205 (9 Cir 1964); *Rodriguez v. Coastal Ships Corporation,* 210 F. Supp. 38 (S.D. N.Y. 1962). The la-

> bor saving method here used which facilitiated the removal of the cargo by motor vehicles may not be held to eliminate the unloading of the cargo from the area of traditional work of the seamen in the service of the vessel." *Spann,* Supra.

In *Pope & Talbot Inc., v. Cordray,* 258 F.2d 214 (9 Cir. 1958), the Ninth Circuit Court of Appeals considered the rights of a longshoreman whose duties involved supervision of the unloading operation from the point where the cargo was at ship-side to its place of rest on the pier. That Court stated:

> "We hold that the duty of providing a seaworthy ship and gear at the time of this accident extended to the appellee, whether or not the appellee was on board the ship or on the dock. The test is, what was the nature of his work? He was performing a service for the ship in the discharge of his cargo. His employer was under contract with the shipowner to take the cargo from the shipside and to put it in a place of storage, and appellee was engaged in the performance of this work. The appellee's work was the work of a longshoreman and he was entitled to seaworthy gear while he was performing his services."

In *Gebhard v. S.S. Hawaiian Legislator,* 425 F.2d 1303 (9 Cir. 1970) the injured longshoreman was a marine clerk whose duty station was at ship-side near a pier based crane. "His duty in the loading operation was to position, in proper sequence, the straddle carriers

under the crane. The containers left by the straddle carriers were then lifted directly on to the ship by crane." The argument was that his duties did not *directly* involve him in the loading operation but were only *preparation* for loading.

> "That narrow view is not supported by the authorities: A petitoner need be only an integral part of the loading process, and *Gebhard* was certainly that" Id. at 1311

It is submitted that the Ninth Court of Appeals decision in *Gebhard* also effectively disposes of that Court's prior decision in *Partenweederi, M/S Belgrano v. Weigel,* 299 F.2d 897 (9 Cir. 1962). In any event, the *Belgrano* case was decided purely on the procedural ground that Plaintiff had failed to meet his burden of proof. "Our *holding* is simply that the libelant failed to meet his burden of proving that the nature of the work performed by him was the 'type of work' traditionally performed by seamen." *Belgrano,* at 902 Emphasis supplied.

In speaking to this question under similar facts the Third Circuit Court of Appeals has stated: "That the work inextricably associated with the loading of the vessel, is as a matter of law, the work of the ship's service, was clearly established in *Hagans* (supra) (*Hagans v Ellerman & Bucknall S.S. Company,* 318 F.2d 563 (1963)) and recently confirmed in *Gutierrez.*" *Thompson v. Calmar S.S. Co.,* 331 F.2d 657 (1964).

While the facts in the Gutierrez opinion do not reveal

at what point in the unloading operation the plaintiff functioned nor does it appear from the First Circuit's opinion (301 F.2d 415 (1962)) Respondent has no doubt that the same result would have been reached if he had been at the same place performing the same function as Bill Law. It would serve no purpose to extend this discussion. Unquestionably the authorities support the Respondent Bill Law. While it is no doubt true that technology allows a more profitable division of labor which expedites the loading operation, it is absolutely incongruous to demand actual physical association with the vessel in order to be entitled to the doctrine of seaworthiness. Such a requirement is so restrictive and uncompromisingly literal that, if relied upon, it would do violence to the humanitarian policy which underlies the warranty which has so often been reaffirmed by this Court. It is submitted that Respondent's intimate and integral involvement in the loading operation was as directly connected with the ship's service as the work being performed on the ship itself. And while it is true, as the District Court held here, that "there must be a beginning for the loading operation", Respondent's work was a part of the continuous operation of loading the SAGAMORE HILL which *had* begun. Loading and unloading do not just start and stop at the "hook-up" point when cargo is being taken aboard or is being taken from a ship, and likewise do not just come to a halt upon or commence from that same point on the dock. No one would deny that cargo is being unloaded as it is moved from its place of stowage in the "wings" of the ship to the cargo hook. The cargo is being handled by the longshoremen all the time. There is no difference in the nature

of their service to the ship but only in the position in which they are at the time of the injury.

C. *EQUIPMENT IN THE SERVICE OF THE SHIP*

Respondent submits that it is a patent absurdity to, on the one hand, concede that the *Gutierrez* longshoreman, working exclusively on the dock is entitled to the doctrine of seaworthiness, and on the other hand, deny that the equipment with which he works need meet the requirements of the warranty. Such logic, if implemented, would be an open invitation for the stevedoring concern to place his new, defect free fork lift machines on the ship to handle cargo and when they become worn out and hazardous place them on the dock. Good economy yes, but hardly an acceptable standard of safety. We cannot believe this is the law for it clearly circumvents the logic of Gutierrez, and the reasoning behind Italia Societa per Azioni di Navipozione v. Oregon Stevedoring Company 376 U.S. 315, 84 S. Ct. 748 (1964) and other cases which uphold third party liability on the sound principal that it is a powerful incentive to improve loading and unloading equipment.

Petitioner brings to the Courts attention Forkin V. Furness Withy, 323 F.2d 638 (2 Cir. 1963) and McKnight V. N.M. Patterson & Sons, 286 F.2d 250 (6 Cir. 1960). No other Circuit Courts have followed the reasoning in those cases and they have received appropriate

treatment.[7] In Huff V Matson Navigation Company, 338 F.2d 205 (9 Cir. 1964) the Court said:

> "Our attention has also been called to the case of Forkin V. Furners Withy & Co. . . (reviewing the facts) . . . The Court held that the shipowner's obligation did not extend to the equipment involved, seemingly because the conveyer had not come in contact with the ship. It continued, 'It may well be that once the conveyor was affixed to the ship, a seaman or a stevedore engaged in unloading or loading, would have been entitled to recover on the ground of unseaworthiness if injured as a result of the conveyor's not being reasonable fit for its intended use, . . . but in such a case the conveyor would have become 'appurtenant' in the significant sense that it would have been within the shipowner's power of inspection whereas here it had not yet reached that status".
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> "We note from the portion of that opinion quoted above that what is there said would constitute a basis for distinguishing the Forkin case from this one. For here the scraper device had been affixed to the ship and was operating in the hold and it would have been with-

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[7]For Federal District Courts in accord with the cited cases see: *Sherbin v. S. G. Embiricos* 200 F. Supp 874 (E.D. La. 1962). (*Sherbin*, being from a lower court within the Fifth Circuit is, of course, overruled by implication by *Bill Law.) Henry v. S.S. Mount Evan*, (D.C.T. Md. 1964) 227 F. Supp. 408.

> in the shipowner's power of inspection. *We do not care to perpetuate any such distinction. We base our refusal to treat the Forkin case as an authority upon the broader ground that the basic theory there applied is manifestly wrong and contrary to the controlling decisions,* as noted in the dissenting opinion in that case.[8] Emphasis added.

> "The suggested concept of liability being predicated upon the shipowner's power of inspection has been rejected repeatedly. In Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926, 933, 4 L.Ed. 2d 941, the Court stated: '(T)he shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability.' (Citing Grillea V United States, 232 F.2d 919, and others)"

Further in the same opinion that Court expressed its views as to both those cases: "We reject what we regard as the ill advised attempts as exemplified in the McKnight and the Forkin cases to attach unwarranted exceptions to the rules heretofore applied by the Supreme Court in this field."

Respondent is not contending that the doctrine of seaworthiness allows recovery regardless of the agency causing the harm. We do urge upon this Court that where a longshoreman is performing work which is in the service of the ship and using equipment which

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[8] See also Deffes v. Federal Barge Lines, Inc., 361 F.2d 422 (1966) for a similar statement concerning these cases.

is likewise, and necessarily so, "in the service of the ship", then the warranty protects him while in that pursuit. We do not feel that nice distinctions can be drawn because of the size of the equipment or that rational decisions can be made on the basis of the equipments physical contact with the vessel. *Spann V. Lauritzen*, 344 F.2d 204 (3 Cir. 1965). The fork lift machine Bill Law was operating, just as Bill Law himself, was an essential, integral part of the loading operation. In *Olvera V. Michalos*, 307 F. Supp. 9 (S.D. Tex. 1968) the Plaintiff was helping to load corn from railroad cars to the ship. He was on the dock and using a "power shovel" also located on the dock when the defective shovel amputated his leg. No one would suppose that such an instrument would have been found on sailing ships. The District Court in denying the defendants motion for summary judgment recognized that if such a device is an essential part of the loading operation, the warranty applies.

Petitioner is concerned that the Court below has not expressly overruled its own case of *Kent V. Shell Oil Co.*, 286 F.2d 746 (5 Cir. 1961). Respondent would emphasize that there is no need to expressly overrule what is merely dictum. *Kent* was decided on a question of State Law and should not be treated as an authority. After deciding the case on this basis the Court added the dictum relied upon by Petitioner. *Kent* of course was decided prior to *Gutierrez*. It is significant to note that the Circuit Court of Appeals in deciding *Guiterrez* cited and quoted language from the *Kent* case concerning the 'awesome' responsibilities of unseaworthi-

ness (301 F.2d 415, at 417) and further that this Court in reviewing and reversing the Appellate Courts decision in *Gutierrez* quoted that same language from *Kent*. *Gutierrez*, 373 U.S. at 208). Clearly, this Court was aware of the *Kent* decision and by its holding in *Gutierrez* made an express reversal of *Kent* a mere formality. In any event the decision in the instant case made it clear that the Fifth Circuit no longer considers *Kent* as valid authority. See also *Chagois V. Lykes Bros. S.S. Company*, 432 F.2d 388 (5 Cir. 1970). Even so, the facts in *Kent* show that the Plaintiff was a truck driver who was delivering pipe to a barge. It was found that he had only an incidental connection with the stevedoring process. Respondent does not quarrel with that conclusion. Bill Law is simply not in the position of that truck driver. Prior to his injury and at the time of his injury he was using the ship's gear, supplied by the stevedoring contractor and was performing work for the ship with that gear.

Respondent thinks it clear that the situation in Bill Law was not unanticipated by this Court when *Gutierrez* was decided. For, as Mr. Justice Harlan said in his dissent in that case:

> "Whether from the standpoint of negligence or unseaworthiness I see no basis for the holding in this case. Presumably the result reached by the Court would be the same — at least consistency demands that it should be the same — if this accident had occurred on the dock while the beams were being *loaded* rather than unloaded." 373 U.S. 206.

Petitioner also makes much over the "lack of control" which a shipowner has over the stevedore's equipment. One need look no further than *Gutierrez* itself to recall that this can no longer be heard as valid argument. If further pronouncements from this Court are necessary for support of this well established principle, Respondent would point to *Seas Shipping Company V. Sieracki,* 328 U.S. 85, 66 S.Ct. 872 (1946), *Mitchell V. Trawler Racer,* 362 U.S. 539, 80 S. Ct. 926 (1960) and *Alaska Steamship Co. Inc., V. Petterson,* 347 U.S. 396, 74 S. Ct. 601 (1954).

In Considine V. Black Diamond Steamship Corporation, 163 F. Supp. 107 (D.C. Mass. 1958), the Court was asked to hold a vessel to be unseaworthy because of a defective loading truck brought aboard by the stevedore. The Defendant argued that this was not the type of equipment found on ships. The Court, relying on *Petterson,* was impelled to the conclusion that the warranty *did* apply.

In his great work on maritime prseonal injuries Martin J. Norris says:

> "It is the use to which the equipment is put, i.e., its use in connection with the ships cargo, that should be the determining factor, not whether the type is 'traditional' ship's equipment. Equipment normally used by some ships may never be used by others and technological advances may introduce equipment unheard of before, much less used." Norris, *The Law of Maritime Personal Injuries,* 2d ED., Sec. 34 (1966).

Respondent thinks this principal is clearly applicable in this instance. It is obvious that if Bill Law was loading the Sagamore Hill, and he most surely was, then the fork lift machine he was operating was a vital and necessary tool, in the service of that function without which the stevedoring operation itself could not be accomplished. It cannot be of consequence that he was operating a motorized piece of equipment. Methods, instruments and implements of loading and unloading a vessel change just as, over the ages, the nature of the cargo changes. It takes little imagination to envision "swabies" or "gobs" or "tars" on the pier rolling barrels of water and wine or pushing crates of silk and spices from a storage area near the ship to a designated place alongside her to be taken aboard. If loading a vessel was the work of seamen during those bygone days, then it is still so as to the *Sieracki* — seaman today. And, just as labor saving devices such as little wheeled carts must have been used in those days, the fact that technology has developed a tool such as a fork lift machine clearly cannot be of significance. Neither can it be an important factor that modern industrial efficiency experts have found that the loading process can be accomplished faster by placing two machines on the dock and two in the hold. If it had been possible for Bill Law to drive his machine across a gangway with his cargo and place it immediately in its final place of "stow", all in one operation, would he or his machine have been any more directly involved in the loading of the vessel? Respondent thinks not. And if the accident had chosen the fortuitous moment that his front wheel first touched the gangway

there would have been no dispute that the warranty protected him and applied to his machine also.

CONCLUSION

The Fifth Circuit Court of Appeals correctly held that the Respondent, a longshoreman working alongside a ship directly and intimately involved in the loading process and using equipment a necessary and integral part of that operation is entitled to the warranty of seaworthiness. Accordingly, the Fifth Circuit's judgment should be affirmed.

Respectfully submitted

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PROOF OF SERVICE

I, Ross Diamond Jr., one of the attorneys for the Respondent herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the ____ day of May, 1971, I served three copies of the foregoing brief of Respondent on Victory Carriers Inc., and Gulf Stevedore Corp., by mailing to same in duly addressed envelopes with first class postage prepaid to Hon. George Wood, 510 Van Antwerp Building, Mobile, Alabama 36601, and to Hon. W. Boyd Reeves, 1101 Merchants National Bank Building, Mobile, Alabama 36602, Attorneys for Petitioners.

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